Supreme Court, U.S.
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In The
Supreme Court of the United States

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC. and MARSHALL JOHNSON, and JERRY VANBOETZELAER, Individually and on Behalf of All Others Similarly Situated,

Petitioners,

v.

NEW PRIME, INC., d/b/a PRIME, INC., and SUCCESS LEASING, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Eighth Circuit err by adopting the rule followed in the Fourth and Fifth Circuits that class certification may be withheld where individualized proof of damages is viewed as predominating over common liability issues rather than the rule followed in the First, Second, Third, Ninth and Tenth Circuits that classes may be certified on the basis of common liability issues regardless of the need for individualized proof of damages?

2. Since 1979, motor carriers have been obligated by federal regulations to return escrow funds to drivers following lease termination. In 1995 the Interstate Commerce Commission Termination Act ("ICCTA") abolished the enforcing agency and authorized drivers to seek direct judicial enforcement. The Eighth Circuit held that application of the ICCTA to lease agreements entered prior to its effective date created impermissible retroactive effects, regardless of whether the leases were terminated before or after its effective date.

   a. Did the Eighth Circuit err by failing to probe Congressional intent as to the temporal reach of the ICCTA where the statute was silent on that question?

   b. Did the Eighth Circuit err in failing to find that direct judicial enforcement was nothing more than a simple change in forum for enforcing pre-existing obligations of motor carriers following abolition of the ICC?

   c. Did the Eighth Circuit err in failing to distinguish between pre-enactment and post-enactment conduct, as required by decisions of the Ninth and Eleventh Circuits, when it held that drivers had no enforcement remedy as to post-enactment refusals to return escrow funds?

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri denying class certification (App. 40-63) is reported at 213 F.R.D. 537 (W.D. Mo. 2002); its opinions granting summary judgment to Defendants (Order, Jan. 22, 2002; App. 23-31 and Order, Aug. 14, 2002; App. 32-39) are unreported. The opinion of the panel of the United States Court of Appeals for the Eighth Circuit (App. 1-22; hereinafter "New Prime II"), affirming the district court, is reported at 339 F.3d 1001 (8th Cir. 2003). The order of the Eighth Circuit denying petitioner's motion for rehearing (App. 64) is not reported.

JURISDICTION

The order of the Eighth Circuit Court of Appeals denying petitioner's petition for rehearing was entered on October 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Part 14704 of Chapter 49 of the U.S. Code provides a private right of action for injunctive relief and damages for violations of the "Truth-in-Leasing" regulations set forth at 49 C.F.R. § 376. These regulations govern a regulated motor carrier's use of leased equipment to provide interstate truck transportation services. The relevant portions

of the statute and the regulations are set out in the appendix to this petition at App. 65-72.

STATEMENT

Statutory and Regulatory Background

Petitioners are owner-operator truck drivers who leased their truck tractors and driving services to New Prime, Inc., a regulated motor carrier that transports freight in interstate commerce. Since 1979 the relationship between owner-operators and regulated motor carriers has been governed by the federal Truth-in-Leasing regulations.[1] A carrier leasing equipment from owner-operators must have a written lease[2] conforming with the regulations.[3] A carrier's conduct must comply with the regulations irrespective of what the actual terms of a particular lease may provide.[4] Among other provisions, the regulations require motor carriers to return owner-operator escrow funds within 45 days following lease termination.[5]

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[1] *See Lease and Interchange of Vehicles*, 131 M.C.C. 141, 1979 WL 11158 (1979) (adopting the leasing regulations). In 1996, the regulations were redesignated from 49 C.F.R. Part 1057 to Part 376 without substantive change. *See* 61 Fed. Reg. 54706, 54707 (Oct. 21, 1996).

[2] 49 C.F.R. § 376.11(a) (1996); 49 C.F.R. § 1057.11(a).

[3] Pursuant to 49 C.F.R. § 376.12, "the written lease required under § 376.11 (a) shall contain the following provisions." The identical prior provision was set forth at 49 C.F.R. § 1057.11(a) (1995).

[4] "The required lease provisions shall be adhered to and performed by the authorized carrier." 49 C.F.R. § 376.12 (1996); 49 C.F.R. § 1057.12 (1995).

[5] 49 C.F.R. § 376.12 (k)(6) (1996); 49 C.F.R. § 1057.12(k)(6) (1995).

Prior to 1996, the legally protected rights of owner-operators were enforceable through the Interstate Commerce Commission which had plenary enforcement authority.[6] Among the remedies available for carriers' violations of the regulations were injunctions to prevent future illegal conduct and to ameliorate past violations, damages paid to owner-operators for violations, and restitution of funds wrongfully withheld from owner-operators.[7]

Nationwide, several hundred thousand owner-operator leases were in effect on January 1, 1996, the effective date of the Interstate Commerce Commission Termination Act ("ICCTA").[8] The ICCTA abolished the ICC, transferred authority over the Truth-in-Leasing regulations to the Department of Transportation ("DOT"), and created a private right of action for owner-operators to

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[6] *See Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 192 F.3d 778, 781 (8th Cir. 1999), *cert. denied*, 529 U.S. 1066 (2000) (*New Prime I*) (discussing ICC enforcement of the regulations).

[7] The ICC had broad authority to enforce the Truth-in-Leasing regulations under 49 U.S.C. § 11701 *et seq.* (1995), including by both administrative action and litigation. *See ICC v. Transcon Lines*, 513 U.S. 138, 145 (1995); *Shaw Warehouse Co. v. Southern R. Co.*, 308 I.C.C. 609, 633-634, 637 (1959) (cease and desist order); *ICC v. All-American, Inc.*, 505 F.2d 1360 (7th Cir. 1974) (court injunction); 49 U.S.C. § 16(8) and 49 U.S.C. § 11901(a) (civil forfeiture). *ICC v. Atlas Van Lines, Inc.*, 825 F.Supp. 771 (N.D. Tex. 1993) (action for injunction and return of escrow funds). The courts also entertained complaints by owner-operators alleging violations of the regulations. *See, e.g., Jacobs v. Central Transport, Inc.*, 891 F.Supp. 1088, 1113 (E.D.N.C. 1995), *rev'd on other grounds*, 83 F.3d 415 (4th Cir. 1996).

[8] Pub.L. 104-88, 109 Stat. 803 (1995) (codified in various sections of Title 49).

enforce the leasing regulations in federal court.[9] Congress preserved the substantive requirements of the Truth-in-Leasing regulations and made it clear that enforcement was now to be accomplished through private suits in federal court. DOT was specifically admonished not to use its scarce resources to resolve owner-operator/carrier disputes, but rather to leave such disputes for resolution by the federal courts.[10] As the House Transportation and Infrastructure Committee stated "DOT should [not] allocate scarce resources to resolve these essentially private disputes, and specifically directs that DOT should not continue the dispute resolution functions in these areas. The bill provides that private parties may bring actions in court to enforce the provisions of the Motor Carrier Act."[11] In accordance with this directive, the DOT expressly declined Petitioners' request to exercise jurisdiction over their grievances against Respondent New Prime.[12]

The Claims at Issue

Petitioners brought this action in 1997 alleging that (1) Respondents' lease terms violated the regulations by

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[9] *New Prime I*, 192 F.3d at 785 (holding that 49 U.S.C. § 14704(a)(1) and (2) provides a private right of action for injunctive relief and damages for violations of leasing regulations).

[10] *ICC Termination Act of 1995: Report of the Committee on Transportation and Infrastructure on HR 2539* ("1995 House Report"), 104th Congress, H.R. Rep. No. 104-311, at 87-88 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 799-800.

[11] *Id.*

[12] 63 Fed. Reg. 31827 (June 10, 1998) (Pet. For Declaratory Order) (referenced in *New Prime I*, 192 F.3d at 785).

improperly permitting the carrier to retain escrow funds following lease termination; and, that (2) Respondents retained such funds after Petitioners' leases were terminated. Each of the leases in question were executed prior to January 1, 1996. In some cases the leases were terminated, and New Prime failed to return escrows, prior to January 1, 1996. In other cases, New Prime continued to operate with these leases after January 1, 1996, and withheld Petitioners' escrows after that date.[13]

The Decision Below

The Eighth Circuit held that (1) application of the ICCTA in this case was barred on grounds of retroactivity both as to Respondents' pre-enactment and post-enactment conduct; and (2) that class certification was properly denied because potential offsets to the amounts owed to Petitioners resulted in individual damage issues predominating over otherwise common liability issues.

The Eighth Circuit conducted a simple two-step retroactivity analysis. First the court asked whether the ICCTA contained an express statement as to its temporal reach. Finding none, the court proceeded to analyze whether the statute created impermissible retroactive effects.[14] The court did not examine the legislative history of the ICCTA to determine Congressional intent as to the temporal scope of the private right of action. The court

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[13] *Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 339 F.3d 1001, 1004-05 (8th Cir. 2003) (*New Prime II*). (App. 5-6.)

[14] *Id.* at 1007 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)). (App. 10.)

held that the Plaintiffs' claims were barred because "[p]rior to the ICCTA, only the ICC could bring claims against motor carriers for failure to comply with the applicable regulations. The ICCTA shifts this power and permits individual Owner-Operators to bring defendants directly into court. We find this creates an impermissible retroactive effect."[15]

On the issue of class certification, the Eighth Circuit relied on the reasoning of the trial court for its holding that individual damages issues trumped the common issues of liability in this case. The trial court relied solely on a district court anti-trust case[16] holding that under the Sherman Act, plaintiffs could not establish liability absent an individual determination of "fact of damage," and that this precluded class certification.[17] Applying the same approach here, the circuit court reasoned that because each individual class member would have to prove that he suffered damages for unlawful escrow practices, "neither Prime nor Success would be liable for returning funds if, for example, the Owner-Operator did not have a positive balance in his escrow account or the funds . . . were offset by other monies owed to Prime or Success."[18] The court affirmed the district court's denial of class certification on the ground that individual issues of damages affecting individual class members would predominate over common questions as to liability.

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[15] *Id.*

[16] *Martino v. McDonald's Systems, Inc*, 86 F.R.D. 145 (N.D. Ill. 1980).

[17] 213 F.R.D. 537, 547 (W.D. Mo. 2002.) (App. 62.) *See New Prime II*, 339 F.3d at 1012. (App. 21-22.)

[18] *New Prime II*, 339 F.3d at 1012. (App. 21-22.)

REASONS FOR GRANTING THE PETITION

This case involves recurring issues of exceptional importance on the issue of class certification which have resulted in a significant split in authority among the circuits. In affirming denial of class certification solely on the basis of individual damage issues, the Eighth Circuit impermissibly conflated the issues of liability and damages to hold that potential offsets to damages went to the existence of liability and, therefore, precluded class certification. The First, Second, Third, Ninth and Tenth Circuits have uniformly held that individual damages issues are insufficient to defeat class certification where common issues of liability predominate. In particular, these circuits have rejected the view, adopted by the Eighth Circuit here, that individual damages issues may defeat class certification on grounds that they are inextricably tied to liability on the basis of a purported "fact of damage" requirement. The Eighth Circuit's approach, which is also followed in the Fourth and Fifth Circuits, eviscerates the distinction between liability and damages and effectively circumscribes the class action remedy in a broad class of cases where defendants allege the existence of counterclaims. Review is necessary to correct this anomalous approach and to secure and maintain uniformity of this Court's decisions.

This case also presents questions of exceptional importance on the issue of retroactivity which must be reached in order to consider the class certification issue. As this Court indicated in *Landgraf v. USI Film Prod.*, the ultimate issue in any retroactivity analysis is Congressional

intent.[19] There is confusion among the circuits, however, as to whether a court's review of legislative intent ends where a statute contains no direct expression of its temporal reach. The Second, Third and Ninth Circuits have held that the ordinary rules of statutory construction must be applied as part of the retroactivity analysis, and a reviewing court must examine legislative history in an attempt to learn congressional intent as to the temporal reach of a statute. Here, after noting that the ICCTA was silent on the question of retroactivity, the Eighth Circuit failed to probe further into legislative intent. Even a cursory look at the legislative setting and history of the ICCTA makes it abundantly clear that Congress had no intention of depriving hundreds of thousands of owner-operators of remedies for past wrongs when it abolished the ICC. Nor did Congress intend to exempt motor carriers from any effective enforcement as to their future conduct under pre-1996 leases. By failing to probe congressional intent, the Eighth Circuit stripped owner-operators of rights they had enjoyed since 1979 giving New Prime virtual immunity for its continuing operations under pre-1996 leases.

Even if the Eighth Circuit did not err when it turned a blind eye to congressional intent, its analysis of the retroactive effect of the statute is fundamentally at odds with this Court's teachings in *Landgraf*[20] and *Hughes Aircraft Co. v. United States ex rel. William J. Schumer*:[21] A simple

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[19] 511 U.S. 244, 280 (1994) (indicating that the presumption against retroactive application may be overcome by "clear congressional intent favoring such a result").

[20] 511 U.S. at 274.

[21] 520 U.S. 939, 951 (1997).

shift in the forum for resolving disputes does not produce impermissible retroactive effects. The retroactivity of the ICCTA has already led to conflicts between district courts in the Eighth and Sixth Circuits. The Eighth Circuit's flawed analysis will likely continue to engender conflict and confusion in cases involving a change in the forum for resolving disputes. This case – where there has been no change in either the class of persons liable or the class of persons seeking recovery and no change in either the relief obtainable or the substantive violations giving rise to that relief – presents an ideal vehicle to clarify this important area of the law.

Finally, the circuit court's extraordinary holding that even claims based on post-statute violations are barred on grounds of "retroactivity" should be reviewed by this Court. Contrary to the Eighth Circuit's approach, the weight of authority in other circuits holds that pre-enactment and post-enactment conduct must be considered separately and that retroactivity concerns do not apply where liability is predicated on acts occurring after the effective date of a statute.

I. THE CIRCUITS ARE SPLIT AS TO WHETHER INDIVIDUAL DAMAGE ISSUES MAY PRECLUDE CLASS CERTIFICATION WHERE COMMON LIABILITY ISSUES PREDOMINATE

The Circuit Courts are split as to whether class certification may be denied under Rule 23(b)(3) where individual issues as to damages are viewed as predominating over common issues as to liability. The Eighth Circuit's holding here is consistent with recent decisions of the Fourth and Fifth Circuits, but is directly at odds with decisions of the First, Second, Third and Ninth Circuits.

The Eighth Circuit relied on the reasoning of the trial court for its holding that individual damages issues trumped the common issues of liability in this case. The trial court relied solely on a district court anti-trust case[22] holding that under the Sherman Act, plaintiffs could not establish liability absent an individual determination of "fact of damage."[23] Because each individual class member would have to prove that he suffered damages for unlawful escrow practices, individual issues of damages would predominate over common issues of liability.

The Eighth Circuit rejected the contrary holding in *In re Visa Check/Mastermoney Antitrust Litigation*[24] where the Second Circuit held that "[c]ommon issues may predominate when liability can be determined on a class-wide basis, even where there are some individualized damage issues."[25] The Second Circuit reasoned that "[i]f defendants' argument (that the requirement of individual proof on the question of damages is in itself sufficient to preclude class treatment) were uncritically accepted, there would be little if any place for the class action device in the

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[22] *Martino v. McDonald's Sys., Inc.*, 86 F.R.D. 145 (N.D. Ill. 1980).

[23] The antitrust "fact of damage" requirement has no application here. Nothing in the statute or regulations demonstrate that there is any "fact of damage" requirement under the ICCTA comparable to that in the Sherman Act. The language of 49 U.S.C. § 14704 merely states in the last sentence of (a)(1) that "[a] person may bring a civil action for injunctive relief," and in section (a)(2) that a carrier "is liable for damages sustained by a person as a result" of a violation. *Compare* 15 U.S.C. § 15 (1994) (authorizing private damage actions for "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws").

[24] 280 F.3d 124 (2d Cir. 2001), *cert. denied*, 536 U.S. 917 (2002).

[25] *Id.* at 139.

adjudication of antitrust claims."[26] The court cautioned that "[s]uch a result should not be and has not been readily embraced by the various courts that have confronted the same argument. The predominance requirement calls only for predominance, not exclusivity, of common questions."[27]

The Second Circuit's position is buttressed upon well-founded decisions of the First, Fifth, Ninth and Tenth Circuits which have each categorically held that individual issues of damages cannot defeat class certification where there are common issues of liability.[28] Where, as here, common questions regarding liability predominate, courts

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[26] 280 F.3d 124, 140 (2d Cir. 2001).

[27] *Id.*

[28] In *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 798 (10th Cir. 1970) the court held that "where the question of basic liability can be readily established by common issues . . . [t]he fact that there may have to be individual examinations on the issue of damages has never been held . . . a bar to class actions." Similarly, in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) the Third Circuit held that "it has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate." In *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976) the Ninth Circuit held that "[t]he amount of damages is invariably an individual question and does not defeat class action treatment." Finally, in *Smilow v. Southwestern Bell Mobile Systems, Inc.*, 323 F.3d 32, 39 (1st Cir. 2003), the First Circuit rejected the proposition that individual issues of damages (specifically, those arising from defendant's quantum meruit and waiver defenses) predominated over common issues of liability. The court observed that "individuation of damages in consumer class actions is rarely determinative under Rule 23(b)(3)."

generally find the predominance requirement to be satisfied even if individual damages issues remain."[29]

On the other hand, both the Fourth and Fifth Circuits have recently endorsed the position of the Eighth Circuit. In *Gunnells v. Healthplan Serv., Inc.*, the Fourth Circuit expressly rejected the holding of *Visa Check*, stating that "regardless of other courts' interpretations of Rule 23, we have flatly held that 'when the defendants' affirmative defenses may depend on facts particular to each plaintiffs' case, class certification is erroneous.'"[30] In *Bell Atlantic Corp. v. AT&T Corp.*, the Fifth Circuit affirmed the denial of a antitrust class action lawsuit on the ground that "where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance."[31]

The widespread confusion and inconsistency among the circuits on how Rule 23(b)'s predominance test should be applied underscores the need for guidance from this Court.

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[29] *Id.* at 40.

[30] 348 F.3d 417, 438 (4th Cir. 2003) (quoting *Broussard v. Meinke*, 155 F.3d 331, 342 (4th Cir. 1998)).

[31] 339 F.3d 294, 302 (5th Cir. 2003).

II. THE EIGHTH CIRCUIT'S RETROACTIVITY ANALYSIS CONFLICTS WITH THE HOLDINGS OF THIS COURT AND OTHER COURTS OF APPEALS.

A. The Eighth Circuit's Refusal to Consider the Intent of Congress in Accordance With the Normal Rules of Statutory Construction Directly Conflicts with Rulings of Other Courts of Appeal and this Court.

The Eighth Circuit conducted a two-step retroactivity analysis. First, the court determined that Congress had not "expressly prescribed" the ICCTA's temporal scope. Second, the court found that the application of the ICCTA in this case would have retroactive effects because Petitioners could not previously sue Respondents in federal court. However, as the Court made clear in *Landgraf*, the ultimate question in any retroactivity analysis is the intent of Congress.[32] The Eighth Circuit failed to make any effort to determine Congressional intent with respect to this particular statute under the normal rules of statutory construction as required by this Court and by other courts of appeal.

In accordance with this Court's teachings in *Landgraf* and *Lindh v. Murphy*[33] both the Ninth and Second Circuits consider the legislative history of the statute at issue in their retroactivity analyses. In *Scott v. Boos*, the Ninth Circuit held that where "Congress has not expressly provided the statute's temporal reach and . . . the statute

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[32] 511 U.S. at 280 (indicating that "clear congressional intent" will overcome the presumption against retroactive application).

[33] 521 U.S. 320, 326 (1997).

has retroactive effect, the presumption against retroactivity applies unless Congress's intent to the contrary is clear."[34] In determining Congress's intent, the court examined in detail the legislative history of the statute.[35] Similarly, in *Benjamin v. Fraser*, the Second Circuit, in determining whether the Prison Litigation Reform Act could be applied retrospectively, also considered the statute's legislative history.[36]

By contrast, the Eighth Circuit refused to examine the legislative history of the ICCTA and in so doing not only ignored, but overrode, the intent of Congress. The decision to abolish the ICC while simultaneously creating a private right of action to fill the enforcement void leaves no room to conclude that Congress intended to exempt all prior conduct and all previously executed leases from *private* enforcement at the same time it effectively ended *public* enforcement.

B. The Eighth Circuit's Ruling on the Purported Retroactive Effect of ICCTA Is Seriously Flawed and Will Engender Conflicts among the Lower Courts.

In addition to failing to examine specific evidence of congressional intent as to the ICCTA, the court below

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[34] 215 F.3d 940, 947 (9th Cir. 2000).

[35] *Id.* at 947-48.

[36] 343 F.3d 35, 48 n.14 (2d Cir. 2003). *See Mathews v. Kidder, Peabody & Co., Inc.*, 161 F.3d 156, 160 (3d Cir. 1998) (noting that under Supreme Court precedent, the normal rules of statutory intent must be applied to determine whether Congress intended statute to apply only prospectively), *cert. denied*, 526 U.S. 1067 (1999).

failed to apply properly this Court's teachings as to when application of a statute may be said to have any retroactive effects. As the Court stated in *Landgraf*, "fairness dictate[s] that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[37] A statute has retroactive effects where its application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[38]

Here, New Prime knew exactly what was expected of it ever since its substantive responsibilities were established under the regulations in 1979. The ICCTA merely shifted jurisdiction from the ICC to the courts when Congress abolished the ICC. The liability of New Prime was not enlarged by the ICCTA nor was there anything in the new law that would require New Prime to alter settled expectations.

Hughes, the sole case relied on by the Eighth Circuit, does not counsel otherwise. *Hughes* involved a suit under the *qui tam* provisions of the False Claims Act (FCA). Prior 1986, *qui tam* actions were not allowed, in any forum, where the government had prior knowledge of the false claim.[39] After the FCA was amended, this so-called "prior knowledge" bar was partially removed and the

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[37] *Landgraf*, 511 U.S. at 265.

[38] *Id.* at 280.

[39] *Hughes Aircraft Co. v. United States ex rel. William J. Schumer*, 520 U.S. 939, 941 (1997).

jurisdictional bar lifted.[40] The Court held that the intervening amendment could not be retroactively applied because it "creates jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well."[41]

Unlike the relator in *Hughes* who had no "substantive rights," no forum, and no remedy prior to the 1986 FCA amendments, Plaintiffs here have had legally protected interests since 1979 and could go to the ICC for enforcement of those interests. Also unlike *Hughes* where the 1986 FCA amendments created "an expanded universe of plaintiffs with different incentives,"[42] the ICCTA here created no new universe of plaintiffs nor were incentives – the return of money unlawfully retained by motor carriers – enlarged.

By misreading *Landgraf* and *Hughes* to forbid application of a statute merely because it provides a new legal mechanism and forum to provide the same types of relief to the same class of plaintiffs against the same class of defendants for breach of the same substantive obligations, the Eighth Circuit has radically extended the presumption against retroactivity and at the same time effectively deprived plaintiffs of *any* remedy in direct contravention of Congressional intent.

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[40] *Hughes*, 520 U.S. at 941.

[41] *Id.* at 951.

[42] *Id.* at 950.

The proper application of *Hughes* and *Landgraf* to the ICCTA is already engendering conflicts among the lower courts. In *Owner-Operator Indep. Drivers Ass'n, Inc. v. Arctic Express, Inc.*, the Southern District of Ohio rejected the Eighth Circuit's approach here and reaffirmed its prior holding distinguishing *Hughes* on the grounds that "the ICCTA simply shifted the power to bring the Defendants into court from the ICC to the owner-operators themselves. The ICCTA did not alter motor carriers' substantive rights or expand the universe of plaintiffs that could bring claims."[43] Guidance to the lower courts is especially needed because, while this Court has recognized the principle that a mere change in forum does not impose impermissible retroactive effects, it has not yet had a case presenting this circumstance. This case presents precisely such a situation and is, therefore, an ideal opportunity to clarify the law.

C. Failure to Extend Private Enforcement Rights to Post-enactment Conduct Conflicts with the Holdings of this Court and the Approach of Other Circuits.

The Eighth Circuit failed to make any distinction between claims based on violations occurring prior to the effective date of the ICCTA, and claims based on violations occurring after that date. Since 1979 Respondents have been required to return Petitioners' escrows within 45 days of lease termination. After the effective date of the ICCTA, and notwithstanding their ample "opportunity to

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[43] 288 F. Supp.2d 895, 901 (S.D. Ohio 2003). *See Owner-Operator Indep. Drivers Ass'n, Inc. v. Arctic Express, Inc.*, 270 F. Supp.2d 990, 996 (S.D. Ohio 2003) (distinguishing *Hughes*).

know what the law is and to conform their conduct accordingly,"[44] Defendants chose to continue operating with nonconforming leases and further chose to refuse to return Plaintiffs' escrows when they became due.[45]

The circuit court held that it was unnecessary to distinguish between pre-statute and post-statute claims. The critical issue is not when the lease was signed but when the violations occurred; "a statute 'is not made retroactive merely because it draws upon antecedent facts for its operation.'"[46] Rather, "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."[47] Indeed, even where a contract was *legal* prior to enactment of a statute, the "continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act" and may give rise to liability without imposing impermissible retroactive effects.[48]

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[44] *Landgraf*, 511 U.S. at 265. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986) (discussing ERISA amendments; "[p]rudent employers then had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations . . . [t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.") (internal citation omitted).

[45] *New Prime II*, 339 F.3d at 1004-05. (App. 5-6.)

[46] *Landgraf*, 511 U.S. at 269 n.24 (quoting *Cox v. Hart*, 260 U.S. 427, 435 (1922)).

[47] *Landgraf*, 511 U.S. at 273.

[48] *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 342 (1897). *See also Chicago & Alton Railroad Co., v. Transbarger*, 238 U.S. 67 (1914) (holding that statute was not applied retroactively because the violation involved was not based solely on conduct "done or omitted

(Continued on following page)

The Eighth Circuit's failure to distinguish between a plaintiffs' pre-statute and post-statute claims is also directly contrary to the holdings of other circuits. In *United States v. Lockheed Missiles & Space Co.*, the Ninth Circuit reversed in part because, in applying the False Claims Act which was amended in 1986, the "district court failed to distinguish between pre-1986 claims and post-1986 claims, and as a result, the court erroneously dismissed the entire action."[49] The Ninth Circuit ruled that the claims that excessive charges continued after 1986 had to be considered separately.[50]

Similarly, even in the criminal sphere with its heightened retroactivity concerns, application of a statute to continued illegal conduct has passed muster. In *United States v. De La Mata*, the Eleventh Circuit held that the government could prosecute defendants for bank fraud based on lease agreements entered into prior to the enactment of the bank fraud statute.[51] The court held that "appellants had a choice; they could have altered their conduct and renegotiated leases with the Bank after giving full disclosure of their interests, or they could continue conduct that was now clearly illegal. Appellants chose to continue collecting and laundering the rent

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before the passage of the Act . . . but because after [passage of the Act] it [the railroad] maintained the embankment in a manner prohibited by that Act").

[49] 190 F.3d 963, 968 (9th Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000).

[50] *Id.*

[51] 266 F.3d 1275, 1287 (11th Cir. 2001), *cert. denied*, 535 U.S. 989 (2002).

proceeds, and thus we uphold appellants' convictions. . . ."[52] The Defendants here had a similar choice, and they too, chose to continue to violate the law. The Eighth Circuit's holding, refusing to allow plaintiffs to proceed on their post-ICCTA claims represents a significant split with the other circuits on this issue and a departure from this court's long-standing holdings in *Trans-Missouri Freight* (1897) and *Chicago and Alton Railroad* (1914) on this important point.[53]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[52] 266 F.3d at 1292.

[53] *See* n.48, *supra*.

339 F.3d 1001

United States Court of Appeals,
Eighth Circuit.

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., Individually and on behalf of all others similarly situated; Marshall Johnson; Jerry Vanboetzelaer, Appellants/Cross-Appellees,

v.

NEW PRIME, INC., doing business as Prime Inc.; Success Leasing, Inc., Appellees/Cross-Appellants.

Nos. 02-3289, 02-3482.

Submitted: May 15, 2003.
Filed: Aug. 21, 2003.
Rehearing and Rehearing En Banc Denied Oct. 20, 2003.

Paul D. Cullen, argued, Washington, DC (David A. Cohen and Thomas A. Sheehan, on the brief), for appellant.

James C. Sullivan, argued, Kansas City, MO (R. Lawrence Ward, William E. Quirk and Richard M. Paul, III, on the brief), for appellee.

Before WOLLMAN, MAGILL, and BEAM, Circuit Judges.

MAGILL, Circuit Judge.

Plaintiffs-Appellants Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), Jerry Vanboetzelaer ("Vanboetzelaer"), and Marshall Johnson ("Johnson")

(collectively "Appellants") appeal the district court's[1] grants of summary judgment in favor of Defendants-Appellees New Prime, Inc. ("Prime") and Success Leasing, Inc. ("Success"). Appellants also appeal the district court's denial of class certification. Prime and Success cross-appeal the district court's dismissal of their state-law counterclaim against Johnson, asking for relief only if this court reverses.

Our jurisdiction is proper pursuant to 28 U.S.C. § 1291 (2000). We find that the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), Pub.L. No. 104-88, 109 Stat. 803 (1995), is not retroactive and therefore does not grant a private right of action to parties of leases executed prior to the effective date of the ICCTA. Accordingly, we affirm.

I.

OOIDA is a business association of owner-operators: individuals who own or control motor carrier equipment, such as a tractor unit, and lease the equipment, along with driving services, to a trucking company. Vanboetzelaer and Johnson are owner-operators and members of OOIDA. Prime is a regulated motor freight carrier, headquartered in Missouri and operating in forty-eight states. Success leases tractor units to independent owner-operators. Owner-operators lease tractor units from Success, and then lease the units, along with their services, back to

[1] The Honorable Dean Whipple, Chief Judge, United States District Court for the Western District of Missouri.

Prime. Prime and Success have the same officers, directors, and shareholders.

An owner-operator ("Owner-Operator") who leases a tractor unit from Success signs a lease agreement ("Lease Agreement"), under which the Owner-Operator makes weekly rental payments and has an option to purchase the leased tractor. Prior to 1997, the Lease Agreement contained three provisions at issue in this appeal: (1) a Repair Reserve, under which Success retained $.035 per mile for tractor repairs in excess of $500; (2) a Tire Replacement Reserve, under which Success retained $.015 per mile for the purchase of tires; and (3) an Excess Mileage Account, under which Success retained $.05 per mile for mileage in excess of 2900 miles per week. The Lease Agreement provided that if the lease was terminated early, the amount retained in the Repair Reserve and the Tire Replacement Reserve became the sole property of Success, and if the Owner-Operator completed the lease, exercised its option to purchase the tractor, or sold it to a third party, the unused funds would be divided equally between Success and the Owner-Operator. As to the Excess Mileage Account, the Lease Agreement provided that if the lease was terminated early, the amount retained became the sole property of Success, and if the Owner-Operator completed the lease, exercised its option to purchase the tractor, or sold it to a third party, Success would pay the Owner-Operator the entire amount retained for excess mileage.

In April 1997, Success amended the Lease Agreement by (1) eliminating the Repair Reserve; (2) providing that at the end of the lease or upon termination, the entire amount withheld in the Tire Replacement Reserve would be returned to the Owner-Operator, less costs attributable

to wear on the tires; and (3) replacing the Excess Mileage Account with an excess mileage charge ("Excess Mileage Charge"), which requires an Owner-Operator to pay an additional sum for mileage over a certain amount, unless the Owner-Operator purchases the tractor unit or completes the lease, in which case an amount equal to the Excess Mileage Charge shall be paid back to the Owner-Operator.

In addition to the Lease Agreement, Owner-Operators sign a "Service Contract"[2] to lease their driving services to Prime. The Service Contract requires the Owner-Operator to provide a $1000 security deposit to ensure full performance of the lease obligations.

A.

Appellants claim that these three reserve accounts and the security deposit violate the Truth-in-Leasing regulations, *see* 49 C.F.R. Part 376 (2003). Specifically, Appellants claim that the withholding and retention of funds in these accounts and in the security deposit: (1) are improper because the lease documents fail to identify and provide an accounting of these "charge back items," in violation of 49 C.F.R. § 376.12(h); (2) are unauthorized deductions from compensation, in violation of § 376.12(i); and (3) are unauthorized deductions of escrow funds, in violation of § 376.12(k). We discuss the specifics of the parties' agreements below.

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[2] This agreement is now known as an "Independent Operating Agreement."

1. Vanboetzelaer

Vanboetzelaer entered two sets of agreements at issue in this appeal. On October 5, 1992, Vanboetzelaer entered a Lease Agreement with Success and a Service Contract with Prime ("October 1992 Lease"). Under the Lease Agreement, Vanboetzelaer leased a tractor unit from Success for a period beginning on October 5, 1992, and ending January 18, 1994. Under the Service Contract, Vanboetzelaer leased the tractor unit back to Prime, along with his driving services.

Under the October 1992 Lease, Success withheld (1) $2894 for the Repair Reserve; (2) $1240 for the Tire Replacement Reserve; and (3) $866 for the Excess Mileage Account. Vanboetzelaer terminated this lease on February 20, 1993, and as a result, Success retained all of these withholdings, in accordance with the Lease Agreement. Success made no interest payments on any of these funds.

Upon termination of the October 1992 Lease, Vanboetzelaer entered a second Lease Agreement and Service Contract, covering a different tractor unit ("February 1993 Lease"). This agreement ran from February 20, 1993, until February 20, 1995, with an automatic one-year extension until February 20, 1996.

Under the February 1993 Lease, Success withheld (1) $20,184 for the Repair Reserve; (2) $2886 for the Tire Replacement Reserve; and (3) $7282 for the Excess Mileage Account. Vanboetzelaer completed his obligations under the lease on February 16, 1996, and subsequently exercised his right to purchase the tractor. In accordance with the Lease Agreement, Success returned to Vanboetzelaer half of the funds from the Repair Reserve and Tire Replacement Reserve and all of the funds from the Excess

Mileage Account. Success made no interest payments on any of these funds. In addition, Prime retained Vanboetzelaer's $1000 security deposit, which he paid pursuant to the Service Contract.

2. Johnson

Johnson also entered two sets of agreements at issue in this appeal. On July 12, 1994, Johnson entered a Lease Agreement to lease a tractor unit from Success and a Service Contract with Prime to provide driving services from July 12, 1994, until August 16, 1995 ("July 1994 Lease"). Johnson terminated the July 1994 Lease on October 18, 1994, and Success retained all of the funds withheld for the Repair Reserve, the Tire Replacement Reserve, and the Excess Mileage Account; a total of $6469.

Upon termination of the July 1994 Lease, Johnson entered a second Lease Agreement, leasing a different tractor unit from Success, and a second Service Contract, leasing this tractor unit, along with his driving services, to Prime for a period from October 18, 1994, until October 18, 1996, with an automatic one-year extension until October 18, 1997 ("October 1994 Lease"). Johnson claims that he received a letter from Success written on Prime letterhead, terminating the October 1994 Lease, effective August 20, 1996. Prime and Success claim that Johnson prematurely terminated the October 1994 Lease on August 20, 1996. Upon termination, Success retained all funds withheld for the Repair Reserve, the Tire Replacement Reserve, and the Excess Mileage Account, a total of $17,945. Johnson received no interest for the funds retained under the July 1994 Lease or the October 1994 Lease.

B.

On August 14, 1997, Vanboetzelaer, Johnson, and OOIDA filed a class-action complaint against Prime and Success, alleging violations of the Truth-in-Leasing regulations. The district court dismissed the complaint, concluding that the Federal Highway Administration ("FHWA") had primary jurisdiction because the claim involved matters within the agency's expertise. This court reversed and remanded, finding, *inter alia,* that the FHWA did not have exclusive jurisdiction over the claim. *Owner-Operator Indep. Drivers Ass'n Inc. v. New Prime, Inc.,* 192 F.3d 778, 783-85 (8th Cir.1999).

On remand, the district court denied Appellants' request for class certification, holding that certification under Federal Rule of Civil Procedure 23(b) was inappropriate because questions affecting individual members predominated over common questions of law or fact. Subsequently, the district court denied Appellants' request to file an interlocutory appeal challenging the denial of certification.

On January 22, 2002, the district court granted partial summary judgment for Prime and Success, holding that the ICCTA does not provide a private right of action for claims based on lease agreements that *terminated* before January 1, 1996, the effective date of the ICCTA. On August 2, 2002, the district court extended its holding, finding that the ICCTA could also not be applied retroactively to grant a private right of action based on lease agreements *executed* before January 1, 1996, thereby granting summary judgment for Prime and Success on the remainder of Vanboetzelaer's and Johnson's claims.

Subsequently, the district court granted summary judgment for Prime and Success on the remaining plaintiff's, OOIDA, claims for declaratory and injunctive relief, finding that (1) the amendments to the Lease Agreement mooted OOIDA's claims; (2) OOIDA lacked standing to challenge agreements entered after January 1, 1996, because it failed to show that any of its members entered into leases with Prime or Success after this date; and (3) the terms contained in the Lease Agreement, as it was amended in April 1997 ("Amended Lease Agreement"), are sound and legal. This appeal followed.

II.

First, we examine whether the district court erred in holding that the ICCTA cannot be applied to conduct predating its enactment and thereby granting summary judgment in favor of Prime and Success on all of Vanboetzelaer's and Johnson's claims. We review a district court's grant of summary judgment *de novo,* applying the same standard as the district court. *Caviness v. Nucor-Yamato Steel Co.,* 105 F.3d 1216, 1223 (8th Cir.1997) (citation omitted). We will affirm only when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* (citation omitted); Fed.R.Civ.P. 56(c) (2003).

A.

The ICCTA transferred the motor carrier regulatory functions of the Interstate Commerce Commission ("ICC") to the Department of Transportation ("DOT") and the Surface Transportation Board ("STB"). *See* 49 U.S.C. § 13501. Within the DOT, the FHWA administers and

enforces regulations regarding lease agreements between motor carriers and Owner-Operators, known as the Truth-in-Leasing regulations. *See* 49 C.F.R. Part 376.

Appellants claim that certain provisions of the Lease Agreements and Service Contracts violated the Truth-in-Leasing regulations. Appellants seek injunctive relief and damages under the following provisions of the ICCTA, entitled "Rights and remedies of persons injured by carriers or brokers":

> (a) In general. –
>
> (1) Enforcement of order. – A person injured because a carrier or broker providing transportation or service subject to jurisdiction under chapter 135 does not obey an order of the Secretary or the Board, as applicable, under this part, except an order for the payment of money, may bring a civil action to enforce that order under this subsection. A person may bring a civil action for injunctive relief for violations of sections 14102 and 14103.
>
> (2) Damages for violations. – A carrier or broker providing transportation or service subject to jurisdiction under chapter 135 is liable for damage sustained by a person as a result of an act or omission of that carrier or broker in violation of this part.

49 U.S.C. § 14704(a).

The ICCTA became effective on January 1, 1996. It is undisputed that all agreements between Appellants and either Prime or Success were executed prior to January 1, 1996. As a result, Prime and Success argue that Appellants may not bring an action under the ICCTA, as the

claims at issue involve agreements which terminated before the effective date of the ICCTA, and the ICCTA was not intended to apply retroactively. Our task is to determine whether the ICCTA applies retroactively, an issue of first impression in our circuit.

B.

"[A] presumption against retroactive legislation is deeply rooted in our jurisprudence." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (citation omitted). The rationale for this presumption is that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* As such, the Supreme Court has provided a framework for determining when a federal statute applies to conduct predating the statute's enactment. First, a court must determine if Congress has expressly prescribed the statute's proper reach. *Id.* at 280, 114 S.Ct. 1483. If Congress has prescribed the reach, "there is no need to resort to judicial default rules." *Id.* If not, a court must examine whether the statute would have a retroactive effect; i.e., "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If the statute would do any of these things, the presumption is that the statute does not govern, absent clear congressional intent otherwise. *Id.*

With regard to the ICCTA, Congress has not expressly prescribed the statute's reach. Therefore, we must proceed to the second step: whether application of the statute in this case would have a retroactive effect. We agree with

the district court that private rights of action for damages based on the ICCTA are limited to actions involving agreements executed after the ICCTA's effective date; otherwise, the statute has a retroactive effect.

Prior to the ICCTA, only the ICC could bring claims against motor carriers for failure to comply with the applicable regulations. The ICCTA shifts this power and permits individual Owner-Operators to bring defendants directly into court. We find that this creates an impermissible retroactive effect.

This issue is analogous to the issue presented in *Hughes Aircraft Co. v. United States,* 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997), in which the Supreme Court held that when a statute expanded the class of plaintiffs who could bring claims, the statute altered the defendant's substantive rights and therefore had a retroactive effect. *Id.* at 950, 117 S.Ct. 1871 ("In permitting actions by an expanded universe of plaintiffs with different incentives, the [new statute] essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued.") (citation omitted). Here, by permitting Owner-Operators to bring their own actions against motor carriers, the ICCTA expands the class of plaintiffs who could bring claims, thereby altering the motor carriers' substantive rights. *But see Owner-Operator Indep. Drivers Ass'n, Inc. v. Arctic Express, Inc.,* No. 97-CV-750, 2003 WL 21645754 (S.D.Ohio July 11, 2003).

The *Hughes* Court also noted that individual plaintiffs will be motivated "primarily by prospects of monetary reward rather than the public good." 520 U.S. at 949, 117 S.Ct. 1871. We find this to be the case here as well: Owner-Operators who sue motor carriers will likely be motivated

by their own potential financial gain. This increases defendant motor carriers' potential liability, thereby creating a retroactive effect.

We find that the application of the ICCTA to the case at bar would result in a retroactive application of the statute, for which there is no evidence of congressional intent. Therefore, we agree with the district court that the ICCTA's private right of action is applicable only to leases executed after the effective date of the ICCTA. Accordingly, we affirm the grants of summary judgment in favor of Prime and Success with regard to Vanboetzelaer's and Johnson's claims, as all of their claims were based on leases and agreements executed prior to January 1, 1996.

III.

Next, we examine whether the district court erred in granting summary judgment in favor of Prime and Success on OOIDA's claims for declaratory and injunctive relief. Again, we review a district court's grant of summary judgment *de novo. Caviness,* 105 F.3d at 1223 (citation omitted). We will affirm only when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* (citation omitted); Fed.R.Civ.P. 56(c).

A.

First, to the extent OOIDA seeks declaratory and injunctive relief based on leases executed prior to January 1, 1996, the effective date of the ICCTA, those claims are barred for the same reasons Vanboetzelaer's and Johnson's claims were barred, as discussed above. Therefore, we

consider here only those claims of OOIDA regarding agreements executed after January 1, 1996. We divide those claims into two groups: (1) agreements entered from January 1, 1996, until April 1997, the effective date of the amendments to the Lease Agreement; and (2) agreements entered after the April 1997 amendments.

B.

With respect to the agreements executed after January 1, 1996, but before April 1997, we find that OOIDA lacks standing. In order for an organization to have standing to assert the claims of its members, it must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). OOIDA has presented no evidence of any OOIDA member that executed an agreement with either Prime or Success during this period. Because no member of OOIDA has standing to sue, OOIDA can not meet the requirements for organizational standing. Therefore, with respect to agreements entered between January 1, 1996, and April 1997, we affirm the district court's grant of summary judgment in favor of Prime and Success.

C.

OOIDA also claims that the Amended Lease Agreement violates the Truth-in-Leasing regulations. The Amended Lease Agreement (1) contains no Repair Reserve; (2) provides

that at the end of the lease or upon termination, the entire amount withheld in the Tire Replacement Reserve will be returned to the Owner-Operator, less costs attributable to wear on the tires; and (3) replaces the Excess Mileage Account with the Excess Mileage Charge, which requires an Owner-Operator to pay an additional sum for mileage over a certain amount, unless the Owner-Operator purchases the tractor unit or completes the lease, in which case an amount equal to the Excess Mileage Charge shall be paid back to the Lessee. OOIDA claims that the Set-Off provision of this Amended Lease Agreement makes the Tire Replacement Reserve and the Excess Mileage Charge escrow funds that do not comply with 49 C.F.R. § 376.12(k), the Truth-in-Leasing regulation governing escrow accounts. We discuss in turn the specifics of the relevant regulations, the Set-Off provision, and how this provision relates to the Tire Replacement Reserve and the Excess Mileage Charge.

1. The Regulations Governing Escrow Funds

The Truth-in-Leasing regulation regarding escrow funds provides:

> (k) Escrow funds. If escrow funds are required, the lease shall specify:
>
> . . . .
>
> (2) The specific items to which the escrow fund can be applied.
>
> . . . .
>
> (6) The conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized

> carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease, and shall provide a final accounting to the lessor or all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of termination.
>
> 49 C.F.R. § 376.12(k).

Escrow fund is defined as "[m]oney deposited by the lessor with either a third party or the lessee to guarantee performance, to repay advances, to cover repair expenses, to handle claims, to handle license and State permit costs, and for any other purposes mutually agreed upon by the lessor and the lessee." § 376.2(*l*). In other words, if the account is considered an escrow fund as defined above, the Amended Lease Agreement must: (1) specify what the funds held in escrow may be used for, § 376.12(k)(2); and (2) specify what items owed to Success at the termination or completion of the lease may be offset against any escrow funds to be returned to the Lessee, § 376.12(k)(6).

2. The Set-Off Provision

The Set-Off provision of the Amended Lease Agreement provides:

> (a) Termination of Lease. If this Lease is terminated prior to the expiration of its term, You grant Success the right to require any carrier that You are leased with, and You shall so authorize that carrier, to off set against any amounts due You by the carrier an amount sufficient to cure any deficiencies in Lease charges, Tire Replacement Reserve, Excess Mileage

Charges, or any other amounts due Success, by virtue of advances made on Your behalf for items referred to in paragraph 22, and to pay those amounts directly to Success.

(b) Completion of Lease. At the time You complete the full term of this Lease, You grant to Success the right to set off against any amounts due You from the Tire Replacement Reserve and any incentives earned by you for completion of this Lease, any amounts due Success by virtue of advances made on Your behalf for items referred to in paragraph 22 under the terms of this Lease. Also, in the event the Tire Replacement Reserve has a negative balance, Success may set off from any incentives earned by You for completion of this Lease amounts sufficient to zero balance the Tire Replacement Reserve. You further authorize Success to offset against any amounts due You under the terms of this Lease, any amounts due the carrier to whom You are leased, and to remit such amounts to that carrier upon request.

Am. Lease Agreement, Appellants' App. at 417-18.

The Amended Lease Agreement explains that the Owner-Operator is responsible for certain financial obligations, described in detail, and that if Success advances funds to meet these obligations, then they may offset the amount owed the Owner-Operator upon termination or completion of the lease, as described above. The financial obligations are specified as: a Qualcomm unit, maintenance and repairs to the tractor unit, licenses, permits, taxes, non- trucking use auto liability insurance, loss or damage to the tractor, equipment missing or damaged upon return of the tractor unit, and costs associated with Prime's or Success's securing possession of the tractor

unit, in the event the Owner-Operator does not voluntarily return the unit. OOIDA argues that offsets against the Tire Replacement Reserve and the Excess Mileage Charge are violations of the Truth-in-Leasing regulations because these accounts are actually escrow funds, and the Set-Off provision, as it relates to these accounts, fails to comply with the regulations governing escrow funds.

a. The Tire Replacement Reserve

The Tire Replacement Reserve provides:

> During the term of this Lease, You agree to place in a Tire Replacement Reserve an amount equal to 1.5 cents per mile that the Tractor travels. You shall authorize the Tire Replacement Reserve amount to be deducted from Your weekly Settlement by any carrier You lease the Tractor to and remitted to Success, and You and Success will require that carrier to provide You with an accounting of the deductions or Success will do so as it receives the payments. You may demand an accounting of the amounts paid by You to the Tire Replacement Reserve at any time.
>
> The Tire Replacement Reserve shall be used to purchase tires for the Tractor while the Lease is in effect. During that time, Success shall pay to You interest equal to the average yield on Ninety-One-Day Thirteen Week Treasury Bills as established in the weekly auction by the Department of Treasury. Interest shall be paid to You quarterly. Upon termination of this Lease, Success shall retain out of the Tire Replacement Reserve an amount equal to the cost attributable to the amount of wear on the tires which occurred during the time this Lease was in effect.

> The calculation of such costs shall be based on the wear of each tire measured in one thirty-seconds of an inch of useable tire remaining at the time of termination. Because the types of tires and their costs vary the resulting calculations may also vary and it is not possible to include an exact calculation of cost in this Lease. However, Success will make available to You upon request, all information necessary to calculate the cost to You attributable to wear on your tires at any given time. The balance of the Tire Replacement Reserve, less amounts set off as provided in paragraph 21, shall be paid to You. In the event You exercise Your option to purchase, all amounts accumulated in the Tire Replacement Reserve, less amounts set off as provided in paragraph 21, shall be paid to You. All amounts to be returned to You from the Tire Replacement Reserve, after authorized deductions, shall be returned within forty-five (45) days following termination of this Lease Agreement.

Am. Lease Agreement, Appellants' App. at 413-14.

OOIDA argues that the Tire Replacement Reserve is an escrow account subject to the Set-Off provision, and that allowing the offset of certain expenses against those escrow funds before they are returned violates § 376.12(k)(2) and (6) because it turns that escrow into an all-purpose general fund. We agree that the Tire Replacement Reserve is an escrow fund; however, we disagree that the Set-Off provision turns the escrow into an all-purpose general fund or in any way violates the Truth-in-Leasing regulations.

Section 376.12(k)(2) requires that a lease agreement specify the "items to which the escrow fund can be applied." § 376.12(k)(2). The Amended Lease Agreement

provides that these funds will be applied to tire expenses during the life of the lease. In addition, the Amended Lease Agreement expressly identifies those debts that an Owner-Operator may incur during the lease period that may offset items owed to the Owner-Operator at the termination of the lease. These debts include advances for the following items: the Qualcomm unit, maintenance and repairs, licenses, permits, taxes, insurance, loss or damage to the tractor, missing or damaged equipment, and costs associated with securing possession of the tractor unit.

We also find that the Set-Off provision does not violate § 376.12(k)(6), which requires the return of remaining escrow funds within forty-five days. The Tire Replacement Reserve funds are required, under the provisions of the Amended Lease Agreement, to be returned to the Owner-Operator within forty-five days. The fact that certain specifically enumerated items may offset the funds returned in no way violates this provision. For these reasons, we agree with the district court that the Tire Replacement Reserve in the Amended Lease Agreement does not violate the Truth-in-Leasing regulations.

b. The Excess Mileage Charge

The Excess Mileage Charge provides:

> The Excess Mileage Charge is based on the accumulated average weekly miles the Tractor travels in excess of the mileage shown in Schedule A. The Excess Mileage Charge shall be adjusted and paid by You weekly based upon the average miles the Tractor travels. If You exercise Your option to purchase, Success shall pay to You

> an amount equal to the entire Excess Mileage Charge paid by You.
>
> Am. Lease Agreement, Appellants' App. at 413.

We agree with the district court that the Excess Mileage Charge does not meet the definition of an escrow fund. Specifically, this charge does not create an account into which money is deposited for any of the purposes provided at 49 C.F.R. § 376.2(*l*). Instead, the purpose of these funds is to cover any decrease in value of the tractor unit based on excess mileage driven; it is not money deposited with the Lessor to which the Lessee has a valid claim. Therefore, the Excess Mileage Charge is not subject to the dictates of § 376.12(k).

IV.

Appellants also argue that the district court erred in refusing to grant their motion for class certification. We review a district court's denial of class certification for abuse of discretion. *Glover v. Standard Fed. Bank,* 283 F.3d 953, 959 (8th Cir.2002) (citation omitted).

The threshold requirements for class certification are: (1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a). The district court found that the Appellants satisfied each of the requirements of Rule 23(a), and we agree.

In addition, Rule 23 requires the court to find that a class action is the appropriate vehicle through which to

resolve the litigation, providing three situations in which a class action would be appropriate. Fed.R.Civ.P. 23(b). Because Appellants seek predominantly monetary relief, we agree with the district court that the applicable provision of Rule 23(b) that must be satisfied is the following:

> [T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.
>
> Fed.R.Civ.P. 23(b)(3).

We also agree with the district court that Appellants have not satisfied this provision, as questions affecting individual members of such a class would predominate over questions of law or fact common to the members.

As the district court pointed out, 49 U.S.C. § 14704(a)(2) provides a right to recover only to persons who have sustained damages as a result of a carrier violation. Therefore, neither Prime nor Success would be liable for returning funds if, for example, the Owner-Operator did not have a positive balance in his escrow account or the funds owed to the Owner-Operator were

offset by other monies owed to Prime or Success. To make such determinations, a court would be required to examine each individual class member's account, including offsets, advances, and other items. Recovery for any plaintiff would be based on individual, not common, questions of fact. Therefore, we affirm the district court's denial of class certification, as we agree that questions affecting individual class members would predominate over common questions of law or fact.

V.

Finally, regarding Prime and Success's cross-appeal of the district court's dismissal of their state law counterclaim against Johnson, we need not address this issue, as Prime and Success asked that the district court exercise supplemental jurisdiction over their claims only if this court reversed and remanded any of Appellants' claims. Therefore, this issue is moot.

VI.

For the foregoing reasons, we affirm the district court.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., and HOWARD JENKINS, MARSHALL JOHNSON, SUSAN JOHNSON, and JERRY VANBOETZELAER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,	)	
Plaintiffs,	)	
v.	)	No. 97-3408-CV-S-1
NEW PRIME, INC., d/b/a PRIME, INC. and SUCCESS LEASING, INC.	)	
Defendants.	)	

ORDER

(Filed Jan. 22, 2002)

Pending before the Court is Defendants' Motion for Summary Judgment. Plaintiffs have filed suggestions in opposition and Defendants have replied thereto. Defendants request that judgment be entered in their favor on Plaintiffs' claims based on lease agreements which terminated before enactment of the Interstate Commerce Commission Termination Act ("ICCTA"). For the following reasons, the Court GRANTS Defendants' motion.

Background

Plaintiffs are owner-operators of tractor-trailer rigs. They have filed suit against the defendants who are motor carriers claiming that agreements entered into between the parties violated the Truth-In-Leasing regulations as codified at 49 C.F.R. 376. Plaintiff Jerry Vanboetzelaer asserts claims arising from two leases. One claim arises out of an agreement entered on October 5, 1992 that was terminated on February 20, 1993. Another claim arises out of an agreement entered on February 20, 1993. Defendants' pending motion deals only with the former agreement.

Plaintiff Marshall Johnson has asserted claims arising from two agreements as well. One claim arises out of an agreement entered on July 12, 1994 that was terminated on October 18, 1994. Another claim arises out of an agreement entered October 18, 1994. Again, Defendants' motion seeks judgment only upon the former agreement.

Summary Judgment Standard

Summary judgment is appropriate if the movant demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2254-55, 91 L. Ed. 2d 265 (1986). The facts and inferences therefrom are viewed in the light most favorable to the nonmoving party. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-90, 106 S. Ct. 1348, 1355-58, 89 L. Ed. 2d 538 (1986). The moving party must carry the burden of establishing both the absence of a genuine issue of material fact and that such party is entitled to judgment as a

matter of law. *See id.* "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327, 106 S. Ct. at 2555.

Discussion

Plaintiffs' claims for damages are brought under a provision of the ICCTA, specifically, 49 U.S.C. § 14704(a)(2) which reads as follows:

> Damages for violations. – A carrier or broker providing transportation or service subject to jurisdiction under chapter 135 is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part.

49 U.S.C. § 14704(a)(2).

Defendant challenges the claims at issue because the agreements upon which they are based terminated before January 1, 1996, the effective date of the ICCTA. Defendant argues that Plaintiff cannot bring an action pursuant to 49 U.S.C. § 14704(a)(2) for damages based on a lease that terminated prior to the enactment of the ICCTA because the ICCTA was not intended to operate retroactively.

"Retroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court provided the framework for the determination of whether a federal statute applies to conduct predating

enactment. In *Landgraf*, the Supreme Court was faced with the question whether a right to recover compensatory and punitive damages along with a right to a jury trial applied to a Title VII case that was pending on appeal when those rights were created by The Civil Rights Act of 1991. *Landgraf*, 511 U.S. at 247. The Supreme Court reasoned as follows:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increased a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280.

Plaintiffs concede that Congress has not expressly indicated that the ICCTA is to be applied retroactively. Thus, the charge of the Court is to determine whether § 14704(a)(2), has a retroactive effect. According to *Landgraf*, Section 14704(a)(2) has a retroactive effect if it impairs rights possessed by a party when he acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions completed. *See id.* at 280.

Prior to the ICCTA, the motor carrier industry was regulated by the Interstate Commerce Commission ("ICC"). *See Owner-Operator Indep. Drivers Assoc., Inc. v. New Prime, Inc.*, 192 F.3d 778, 781 (8th Cir. 1999). The purpose of the ICCTA was to deregulate the industry. *See id.* The motor carrier provisions of the ICCTA eliminated certain functions of the ICC and transferred the remaining regulatory oversight functions to the Federal Highway Administration. *See id.* at 780.

The ICCTA addressed dispute resolution within the industry. A report of the House Transportation and Infrastructure Committee states:

> In addition to overseeing the background commercial rules of the motor carrier industry, the ICC currently resolves disputes that arise in such areas. There is no explicit statutory requirement to do so. . . . The ICC dispute resolution programs include household goods and auto driveway carriers, brokers, owner-operator leasing, loss and damage claims, duplicate payments and overcharges, and lumping.
>
> The bill transfers responsibility for all the areas in which the ICC resolves disputes to the Secretary (except passenger intercarrier disputes). The Committee does not believe that DOT should allocate scarce resources to resolving these essentially private disputes, and specifically directs the DOT should not continue the dispute resolution functions in these areas. The bill provides that private parties may bring actions in court to enforce the provisions of the Motor Carrier Act. This change will permit these private, commercial disputes to be resolved the way that all other commercial disputes are resolved – by the parties.

H.R.Rep. No. 104-311, at 87-88 (1995) (emphasis added), *quoted in Owner-Operators Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 192 F.3d 778, 781 (8th Cir. 1999). In other words, it appears that before the ICCTA disputes between carriers and owner-operators were settled by the ICC although there was no specific statutory authority for it do so. The committee reasoned that section 14704 "expands the current law which only permits complaints brought under the Act to be brought before the ICC." H.R.Rep. No. 104-311, at 120-121 (1995) (emphasis added).

While the presumption against retroactivity is strong, changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. *Landgraf*, 511 U.S. at 275. This is because procedural rules regulate secondary rather than primary conduct. *See id.* The question, therefore, is whether the transfer of enforcement of the Truth-in-Leasing regulations from the ICC to the courts along with a private right to recover damages is the sort of procedural change regulating only secondary conduct.

In *Landgraf*, the Court dealt with the question of whether to apply amendments to Title VII to conduct occurring before their enactment. One amendment at issue gave plaintiffs a right to a jury trial and the second amendment allowed plaintiffs to recover compensatory and punitive damages for conduct in violation of Title VII. *See Landgraf* 511 U.S. at 247. The Supreme Court reasoned:

> [t]he jury trial right . . . is plainly a procedural change of the sort that would ordinarily govern in trials conducted after its effective date. . . . However, because [the statute] makes a jury trial available only "[i]f a complaining party seeks

> compensatory or punitive damages," the jury trial option must stand or fall with the attached damages provisions.

Landgraf 511 U.S. at 280-81. The Supreme Court then reasoned:

> the new compensatory damages provisions would operate "retrospectively" if it were applied to conduct occurring before [the provision's enactment]. The introduction of a right to compensatory damages is . . . the type of legal change that would have an impact on private parties' planning. . . . [I]f applied here, that provision would attach an important new legal burden to that conduct.

Landgraf 511 U.S. at 282-83.

The question, therefore, appears to be whether § 14704(a)(2) does more than simply change the forum in which the pending dispute was to be brought. If § 14704(a)(2) were to simply transfer disputes from the ICC to the courts, it would be analogous to providing a jury trial where none previously existed and thus regulates secondary conduct and can be applied retroactively. If, however, the statute provides a cause of action or damages to which Plaintiff was not previously entitled, the statute would have an impermissible retroactive effect if applied to leases executed before its enactment.

The Court can find no authority pursuant to which owner-operators could pursue a private right of action for damages from a carrier arising from violations of the Truth-in-Leasing regulations, such as the pending action, prior to enactment of the ICCTA. What is clear, however, is that when Congress enacted the ICCTA, it removed any

doubt by expressly granting parties injured in violation of the regulations, including the Truth-in-Leasing regulations, a private action for damages in court. *See Owner-Operators Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 192 F.3d 778 (8th Cir. 1999).

Plaintiffs counter that the ICCTA was not intended to change the "fundamental liabilities" of carriers under the Truth-in-Leasing regulations, Plaintiffs contend that owner-operators had the ability to sue for damages for violation of leasing regulations prior to the enactment of the ICCTA. As support for this assertion, Plaintiffs rely on two district court opinions where suits were brought against carriers for violations of regulations prior to enactment of the ICCTA. *See Strickland v. Trucker Express, Inc.*, CV-95-62-M-RFC (D. Mont. Mar. 24, 2000); *Jacobs v. Central Transport, Inc.*, 891 F. Supp. 1088, 1113 (E.D.N.C. 1995). In neither of the cases cited by Plaintiffs, however, did the Court address whether a private right of action for damages existed for violation of the Truth-in-Leasing regulations. These cases, therefore, are of little value.

The enactment of § 14704(a)(2) imposes a liability for conduct where it appears none previously existed. As such, the Court finds that section [sic] § 14704(a)(2) may increase a party's liability for past conduct, or impose new duties with respect to completed transactions. The Supreme Court's holding in *Landgraf* therefore, dictates that the statute cannot be applied to conduct predating its enactment absent clear congressional intent. Such intent being absent, the Court must grant Defendants judgment on the contracts at issue in the pending motion.

Defendants have argued in the alternative that Plaintiffs' claims are barred by a statute of limitations. In light of the above analysis, the Court need not address this argument.

Therefore, the Court hereby GRANTS Defendant's Motion for Partial Summary Judgment.

IT IS SO ORDERED.

/s/ Dean Whipple
Dean Whipple
United States District Judge

Date 1-22-02

2002 WL 32058304 (W.D.Mo.)

United States District Court,
W.D. Missouri, Southern Division.

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., and Howard Jenkins, Marshall Johnson, Susan Johnson, and Jerry Vanboetzelaer, Individually and on Behalf of All Others Similarly Situated, Plaintiffs,

v.

NEW PRIME, INC., d/b/a Prime, Inc. and Success Leasing, Inc., Defendants.

No. 97-3408-CV-S-1.

Aug. 14, 2002.

ORDER

WHIPPLE, J.

Pending before the Court is Defendants' Motion for Summary Judgment. Plaintiffs have filed suggestions in opposition and Defendants have replied thereto. Defendants request that judgment be entered in their favor on Plaintiffs' claims based on lease agreements which terminated before enactment of the Interstate Commerce Commission Termination Act ("ICCTA"). For the following reasons, the Court GRANTS Defendants' motion.

Background

Plaintiffs are owner-operators of tractor-trailer rigs. They have filed suit against the defendants who are motor carriers claiming that agreements entered into between the parties violated the Truth-In-Leasing regulations as codified at 49 C.F.R. 376. Plaintiff Jerry Vanboetzelaer

asserts claims arising from two leases. One claim arises out of an agreement entered on October 5, 1992 that was terminated on February 20, 1993. Another claim arises out of an agreement entered on February 20, 1993. Defendants' pending motion deals only with the former agreement.

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49 U.S.C. § 14704(a)(2).

_____ Defendant challenges the claims at issue because the agreements upon which they are based terminated before January 1, 1996, the effective date of the ICCTA. Defendant argues that Plaintiff cannot bring an action pursuant to 49 U.S.C. § 14704(a)(2) for damages based on a lease that terminated prior to the enactment of the ICCTA because the ICCTA was not intended to operate retroactively.

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The question, therefore, appears to be whether § 14704(a)(2) does more than simply change the forum in which the pending dispute was to be brought. If § 14704(a)(2) were to simply transfer disputes from the ICC to the courts, it would be analogous to providing a jury trial where none previously existed and thus regulates secondary conduct and can be applied retroactively. If, however, the statute provides a cause of action or damages to which Plaintiff was not previously entitled, the statute would have an impermissible retroactive effect if applied to leases executed before its enactment.

The Court can find no authority pursuant to which owner-operators could pursue a private right of action for damages from a carrier arising from violations of the Truth-in-Leasing regulations, such as the pending action, prior to enactment of the ICCTA. What is clear, however, is that when Congress enacted the ICCTA, it removed any doubt by expressly granting parties injured in violation of the regulations, including the Truth-in-Leasing regulations, a private action for damages in court. *See Owner-Operators Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 192 F.3d 778 (8th Cir.1999).

Plaintiffs counter that the ICCTA was not intended to change the "fundamental liabilities" of carriers under the Truth-in-Leasing regulations. Plaintiffs contend that owner-operators had the ability to sue for damages for violation of leasing regulations prior to the enactment of the ICCTA. As support for this assertion, Plaintiffs rely on two district court opinions where suits were brought

against carriers for violations of regulations prior to enactment of the ICCTA. *See Strickland v. Trucker Express, Inc.,* CV-95-62-M-RFC (D.Mont. Mar. 24, 2000); *Jacobs v. Central Transport, Inc.,* 891 F.Supp. 1088, 1113 (E.D.N.C.1995). In neither of the cases cited by Plaintiffs, however, did the Court address whether a private right of action for damages existed for violation of the Truth-in-Leasing regulations. These cases, therefore, are of little value.

The enactment of § 14704(a)(2) imposes liability for conduct where it appears none previously existed. As such, the Court finds that section § 14704(a)(2) may increase a party's liability for past conduct, or impose new duties with respect to completed transactions. The Supreme Court's holding in *Landgraf* therefore, dictates that the statute cannot be applied to conduct predating its enactment absent clear congressional intent. Such intent being absent, the Court must grant Defendants judgment on the contracts at issue in the pending motion.

Defendants have argued in the alternative that Plaintiffs' claims are barred by a statute of limitations. In light of the above analysis, the Court need not address this argument.

Therefore, the Court hereby GRANTS Defendant's Motion for Partial Summary Judgment.

IT IS SO ORDERED.

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213 F.R.D. 537

United States District Court,
W.D. Missouri,
Southern Division.

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., and Marshall Johnson, Jerry Vanboetzelaer, Individually and on behalf of All Others Similarly Situated, Plaintiffs,

v.

NEW PRIME, INC., d/b/a Prime, Inc. and Success Leasing, Inc., Defendants.

No. 97-3408-CV-S-1.

Feb. 25, 2002.

Owner-operators of tractor-trailer rigs brought action against motor carriers claiming that lease purchase agreements entered into between parties violated Truth-In-Leasing regulations. On plaintiffs' motion for class certification, the District Court, Whipple, Chief Judge, held that: (1) plaintiffs satisfied numerosity and commonality requirements; (2) suit did not primarily seek injunctive relief; and (3) common issues of law and fact did not predominate.

Motion denied.

Daniel E. Cohen, The Cullen Law Firm, Washington, DC, *Jerry Kirksey*, Attorney at Law, Bolivar, MO, for plaintiffs.

James C. Sullivan, Richard M. Paul III, Shughart, Thompson, Kansas City, MO, for defendants.

ORDER

WHIPPLE, Chief Judge.

Pending before the Court is Plaintiffs' Motion for Class Certification. Defendants have filed suggestions in opposition and the Plaintiffs replied thereto. For the following reasons, the Court DENIES Plaintiffs' Motion for Class Certification.

I. Background[1]

Plaintiffs are individual owner-operators who own or control truck tractors, and sometimes truck trailers for use in interstate transportation. Defendant New Prime, Inc., ("Prime"), is a motor carrier providing transportation services to the public under authority of the Department of Transportation ("DOT"). Defendant Success Leasing, Inc., ("Success"), is an alter-ego or affiliate of Prime which enters into lease-purchase agreements with independent owner-operators that lease, with the option to purchase, truck tractor units to the owner-operators.

Generally, owner-operators are independent contractors that lease their services and equipment to carriers authorized to transport goods by the DOT. The relationship between carriers and owner-operators and the lease that governs it are regulated by the federal government. Plaintiffs bring the pending action to recover damages for

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[1] The Court accepts Plaintiffs' allegations as true in determining whether the proposed class should be certified. *See Clay v. Amer. Tobacco Co.*, 188 F.R.D. 483, 486 (S.D.Ill.1999).

violations of the federal Truth-in-Leasing regulations codified at 49 C.F.R. § 376.12.

According to Plaintiffs' first amended class complaint, Plaintiffs entered into a contract called the "Service Contract" whereby the plaintiff owner-operator leased a truck tractor unit and driving services to defendant Prime for the transport of property. Plaintiffs contend that this is a lease to which the Truth-in-Leasing regulations apply. The plaintiff owner-operators were generally compensated on a per-load basis, and were entitled to percentage of the revenues paid to defendant Prime by shippers. The plaintiff owner-operator would receive his or her compensation in a "settlement check" on a weekly basis.

The Service Contract required owner-operators to furnish to defendant Prime a "Security Deposit" in the sum of $1,000.00 "as security for the full performance . . . of all obligations under the contract." The Service Contract provided that defendant Prime was entitled to set-off against the Security Deposit any "reserve claims which [defendant Prime had] reason to believe should be rightfully charged to the [plaintiff owner-operators]." The Service Contract provided that the Security Deposit was forfeited if the plaintiff owner-operator did not comply with the provisions of the Service Contract requiring the return of licenses, placards and other authorizations within seven days of termination.

According to Plaintiffs, each plaintiff owner-operator then entered into a second agreement with either defendant Prime or defendant Success Leasing known as the "Lease Purchase Agreement." The Lease Purchase Agreement is a contract pursuant to which each plaintiff owner-operator leased from defendant Prime or defendant Success

Leasing, with the option to purchase, one or more truck tractor units. The unit was to be used in providing services to "a trucking company approved [by one of the defendants]." The company to which services were provided was defendant Prime in every instance. The rental payments owing under the Lease Purchase Agreements were deducted directly from each plaintiff owner-operators weekly Service Contract settlement check. Plaintiffs maintain that the Lease Purchase Agreement is an "equipment purchase or rental contract" regulated by the Truth-in-Leasing regulations codified at 49 C.F.R. § 376.12.

Pursuant to the Lease Purchase Agreements, the plaintiff owner-operators are required to furnish funds for maintenance and repair which are maintained in the following accounts: an "Excess Mileage Rental Account"; a "Repair Reserve" and; a "Tire Replacement Reserve." The amounts to be deposited in these accounts are directly deducted from the plaintiff owner-operator's Service Contract settlement check. Plaintiffs maintain that these accounts constitute regulated escrow funds pursuant to the Truth-in-Leasing regulations.[2]

Under the terms of the Lease Purchase Agreements, if the agreement is terminated before the end of its term and the owner-operator does not purchase the truck equipment, the plaintiff owner-operator forfeits the money

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[2] The regulations define an "escrow fund" as "[m]oney deposited by the lessor with either a third party or the lessee to guarantee performance, to repay advances, to cover repair expenses, to handle claims, to handle license and State permit costs, and for any other purposes mutually agreed upon by the lessor and the lessee." 49 C.F.R. § 376.2(1).

accumulated in all of the above-referenced escrow accounts. Furthermore, if the owner-operator completes the lease and does purchase the equipment, half of the "Repair Reserve" and "Tire Replacement Reserve" is forfeited.

In Count I of their complaint, Plaintiffs maintain that the Service Contract does not adequately specify the items defendant Prime will deduct from the plaintiff owner-operator's compensation at the time of settlement. Plaintiffs also complain that the Service Contract does not indicate how the amounts will be calculated. Plaintiffs maintain that the Service Contract violates 49 C.F.R. § 376.12(h) which reads as follows:

> Charge Back Items. The lease shall clearly specify all items . . . ultimately deducted from the lessor's compensation at the time of payment or settlement, together with a recitation as to how the amount of each item has been computed. The lessor shall be afforded copies of those documents which are necessary to determine the validity of the charge.

49 C.F.R. § 376.12(h).

In Count II, Plaintiffs maintain that the Service Contract fails to reference the terms of the direct deduction for rental payments or escrow withholdings made pursuant to the Lease Purchase Agreement. Plaintiffs contend that this violates 49 C.F.R. § 376.12(i) which reads:

> Products, equipment, or services from authorized carrier. The lease shall specify that the lessor is not required to purchase or rent any products, equipment, or services from the authorized carrier as a condition of entering into the lease arrangement. The lease shall specify the terms of any agreement in which the lessor is a party to equipment purchase or rental contract which

> gives the authorized carrier the right to make deductions from the lessor's compensation for purchase or rental payments.

49 C.F.R. § 376.12(i).

In Count III, Plaintiffs allege that Defendants' direct deductions for escrow funds from the plaintiff owner-operators' Service Contract compensation and Defendants' retention and failure to return escrow funds are unlawful according to 49 C.F.R. § 376.12(k). That section states that if escrow funds are required under a lease, the lease must specify the following:

> (1) The amount of any escrow fund or performance bond required to be paid by the lessor to the authorized carrier or to a third party.
>
> (2) The specific items to which the escrow fund can be applied.
>
> (3) That while the escrow fund is under the control of the authorized carrier, the authorized carrier shall provide an accounting to the lessor of any transactions involving such fund. The carrier shall perform this accounting in one of the following ways:
>
> (i) By clearly indicating in individual settlement sheets the amount and description of any deduction or addition made to the escrow fund; or
>
> (ii) By providing a separate accounting to the lessor of any transactions involving the escrow fund. This separate accounting shall be done on a monthly basis.
>
> (4) The right of the lessor to demand to have an accounting for transactions involving the escrow fund at any time.

> (5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury.
>
> (6) The conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease, and shall provide a final accounting to the lessor or all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of termination.

49 C.F.R. § 376.12(k)(1)-(6).

Plaintiffs allege multiple violations of § 376.12(k). The Service Contract does not authorize deductions from compensation or permit the retention of escrow funds following termination of the Service Contract. Furthermore, the Service Contracts do not reference the terms of the Lease Purchase Agreement giving Defendants the right to make deductions from the Service Contract compensation. The Service Contract does not specify the amount of any escrow fund required. The Service Contract does not specify the items to which the escrow funds will be applied. The Service Contract does not indicate that

Defendants will provide an accounting of the escrow funds. The Service Contract does not specify the right of the plaintiff owner-operator to demand an accounting of the funds. There are no provisions specifying that Defendants will pay interest as set forth under § 376.12(k)(5). The Service Contract does not specify (i) any conditions upon which the escrow funds will be returned, (ii) that defendant Prime may deduct moneys for obligations incurred by the owner-operator which were specified in the lease when the escrow fund is returned and that the owner-operator is entitled to a final accounting and (iii) that in no event shall the escrow funds be returned later than 45 days following termination of the lease.

Plaintiffs allege that the Lease Purchase Agreements authorize the unlawful retention of escrow funds in excess of amounts needed to offset obligations incurred by Defendants on behalf of the owner-operator. Plaintiffs allege that the Lease Purchase Agreements violate 49 C.F.R. § 376.21(k)(6) because only one half of the escrow provisions are returned under certain circumstances. Additionally, the Lease Purchase Agreements provide for complete forfeiture of escrow funds if the lease is terminated prior to its expiration, if the owner-operator does not extend the lease, or if the lease is terminated during an extension before the lease expires. Plaintiffs allege that Defendants continue to hold escrow funds to which plaintiff owner-operators are entitled.

According to Plaintiffs, each class member's lease-purchase agreement and Service Contract is "substantively identical." Plaintiffs allege that there are in excess of 10,000 class members.

A. Plaintiff Jerry Vanboetzelaer's Claim

Plaintiff Jerry Vanboetzelaer entered into a Lease Purchase Agreement with defendant Prime on February 20, 1993 for the purpose of leasing trucking equipment and at the same time entered into Service Contract whereby he leased that same equipment and his services to defendant Prime. Under the Service Contract, plaintiff Vanboetzelaer was required to deposit $1,000.00 with defendant Prime as security for performance. The Service Contract failed to disclose the deductions from compensation under the Lease Purchase Agreement.

Plaintiff Vanboetzelaer fulfilled his obligations under the agreements and exercised his right to purchase a trailer on February 16, 1996. He had paid $7,282.08 into the excess miles reserve fund, $2,886.17 into the tire reserve, and $20,183.69 into the repair reserve. Upon completion of the lease, defendant Prime returned to Plaintiff Vanboetzelaer the entire excess miles reserve fund but retained half of both the tire reserve and repair reserve as well as the $1,000 security deposit under the Service Contract.

B. Plaintiff Marshall Johnson's Claim

On October 18, 1994, Plaintiff Marshall Johnson entered into an arrangement with defendant Success whereby defendant Success leased to plaintiff Johnson, with the option to purchase, trucking equipment. Simultaneously, plaintiff Johnson leased that equipment to defendant Prime under the terms of a Service Contract. The provisions of plaintiff Johnson's agreements that are at issue in this case were identical to those contained in plaintiff Vanboetzelaer's agreements.

On August 22, 1996, plaintiff Johnson's lease was cancelled by Defendants. He had paid $3,782.40 into the excess miles reserve fund, $1,035.57 into the tire reserve, and $12,127.04 into the repair reserve. Because this lease was terminated before completion, Defendants retained the entire amount contained in the escrow accounts in addition to the $1,000.00 security deposit.

II. Analysis

The Court has wide discretion in determining whether to certify a class. *See White v. Nat'l Football League,* 41 F.3d 402, 407 (8th Cir.1994). The party moving for class certification has the burden of proof that all requirements for certification are satisfied. *See Bishop v. Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n.,* 686 F.2d 1278, 1288 (8th Cir.1982). The decision whether to certify a class is based on a rigorous analysis of the facts of a case. *See Gen. Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 155, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). Courts do not inquire, however, into the merits of the underlying claims of the class representatives. *See Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). In determining whether to certify a class, the Court has the discretion to "probe behind the pleadings" before making the determination. *See Gen. Tel. Co. v. Falcon,* 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).

A. Plaintiffs' Proposed Class Definition

Plaintiffs' first obligation is to adequately define the class. *See* 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1760

(2001) ("Although not specifically mentioned in the rule, an essential prerequisite of an action under Rule 23 is that there must be a 'class.'"). Plaintiffs move this Court to certify a class as follows:

> [A]ll independent truck owner-operators who have (1) entered into a lease-purchase agreement with either New Prime, Inc., ("Prime"), or Success Leasing, Inc. ("Success"), which purports to lease, with the option to purchase, trucking equipment from Prime or Success to the owner-operator, (2) then leased that equipment in service to motor carrier Prime under the terms of a "Service Contract" between Prime and the owner-operator, and (3) paid money into "reserve" and "security deposit" accounts retained by Prime or its affiliate Success.

Defendants argue that Plaintiffs' proposed class definition is unworkable for a variety of reasons.

First, Defendants argue that Plaintiffs' class definition is unworkable because it includes no date restrictions. Therefore, the class includes members whose claims have either expired under the applicable statute of limitations or predate the enactment of 49 U.S.C. § 14704, the statute creating the private right of action brought by Plaintiffs.

Since Plaintiffs filed their motion for class certification, the Court, in an order granting Defendants partial summary judgment, held that 49 U.S.C. § 14704 created a cause of action that cannot serve as the basis of claims that accrued before January 1, 1996, the effective date of the Interstate Commerce Commission Termination Act ("ICCTA"). That holding effectively supplies the time limitation for Plaintiffs class and renders Defendants argument moot. Therefore, the Court will proceed to

determine whether the class as defined is appropriate for certification.

B. Does Plaintiffs' Class Satisfy the Prerequisites of Rule 23(a)?

Whether an action is appropriately maintained as a class action is determined by the application of Federal Rule of Civil Procedure 23. The first task of the Court is to determine whether the proposed class satisfies the "prerequisites" enumerated in Rule 23(a). Rule 23(a) reads as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

1. Numerosity

The first requirement of Rule 23(a) is that the proposed class be so numerous that joinder of all members is impracticable. *See* Fed.R.Civ.P. 23(a)(1). Although various factors determine whether joinder is impracticable, an extremely large number of class members alone can satisfy the requirement of numerosity. *See Lockwood Motors, Inc. v. General Motors Corp.*, 162 F.R.D. 569, 574-75 (D.Minn.1995); 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.22[3][a] (3d ed.1997). Plaintiffs' proposed

class consists of over 10,000 owner-operators located throughout the United States. Therefore, the Court finds that joinder would be impracticable, if not impossible, in this case.

2. Commonality

Rule 23(a) requires that there be "questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). Rule 23(a)'s requirement of commonality is satisfied when a legal question linking the class members is "substantially related to the resolution the litigation." *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174 (8th Cir.1995). It is important to note that a finding of "commonality" pursuant to Rule 23(a)(2) does not require a showing that the common issues predominate over individual issues. *See* Fed.R.Civ.P. 23(a)(2); *Bates v. United Parcel Serv.*, 204 F.R.D. 440, 445 (N.D.Cal.2001); *Parkhill v. Minn. Mut. Life Ins. Co.*, 188 F.R.D. 332, 338 (D.Minn.1999).

In the agreements executed by potential class members, the relevant lease provisions about which the Plaintiffs complain are substantially similar in all material aspects. Furthermore, the Court finds that Plaintiffs have alleged a common course of conduct on the part of Defendants that has purportedly violated the Truth-in-Leasing regulations. Thus, the common question linking members of the class is whether the Service Contract and the Leasing Agreement, contracts into which all class members entered, violate the Truth-in-Leasing regulations. This link between the members is sufficient to satisfy the commonality prerequisite of Rule 23(a)(2).

Defendants strenuously argue against this conclusion. Those arguments, however, will be addressed in this

opinion as they apply to the predominance requirement of Rule 23(b)(3).

3. Typicality

Rule 23(a)'s typicality requirement is "fairly easily met so long as other class members have claims similar to the named plaintiffs." *DeBoer,* 64 F.3d at 1174. "[F]actual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal theory." *Alpern v. UtiliCorp United, Inc.,* 84 F.3d 1525, 1540 (8th Cir.1996).

Defendants argue that Plaintiffs cannot satisfy the typicality prerequisite because potential class members may not have suffered any damages, i.e. they are not entitled to the return of escrow funds because of valid offsets or charges against the escrow funds exceeded the amount withheld. While this argument has merit, the Court finds that it is more appropriately addressed as part of the Rule 23(b)(3) analysis later in this order.

Furthermore, Defendants have counterclaimed for breach and claim an offset as to plaintiff Johnson. The Court finds that any variations between the claims of Johnson and potential class members is not sufficient to prevent Plaintiffs from satisfying the typicality prerequisite of Rule 23(a)(3). The Court finds that the claims of the potential class members arises from the same course of Defendants' conduct and gives rise to a claim under the same legal theory as the claims asserted by named plaintiffs.

Therefore, the Court finds that Plaintiffs have satisfied the prerequisite of typicality under Rule 23(a)(3).[3]

4. Adequacy of Representation

The final prerequisite of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). Requiring that the representative parties will fairly and adequately protect the interests of the absent class members insures the protection of the due process rights held by the absent class members. *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 721 (11th Cir.1987); 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.25[1] (3d ed.1997). A proposed class satisfies this prerequisite if the following elements are met: "(1) that the plaintiff's attorney is qualified, experienced, and will competently and vigorously prosecute the suit, and; (2) that the interest of the class representative is not antagonistic to or in conflict with other members of the class." *Fielder v. Credit Acceptance Corp.*, 175 F.R.D. 313, 320 (W.D.Mo.1997).

Defendants do not dispute Plaintiffs' attorneys' qualifications or intentions, however, Defendants argue that the named Plaintiffs cannot adequately represent the

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[3] Defendants, in arguing that Plaintiffs claims lack typicality, assert that Plaintiff Owner-Operator Independent Drivers Association, Inc. ("OOIDA") lacks standing to serve as a class representative. The Court declines to address the argument. Regardless whether OOIDA is a proper class representative the other named Plaintiffs would suffice as class representatives. Furthermore, as demonstrated in this opinion, regardless whether OOIDA is a proper class representative, class certification is inappropriate.

interests of absent class members because their individual claims differ from those of the proposed class members. This argument is based on Defendants' allegation that plaintiff Johnson breached his agreements with Defendant and thus, is not entitled to escrow funds regardless of the legal validity of Plaintiffs' claims. The Court finds this argument unpersuasive. While plaintiff Johnson may be subject to a counterclaim for breach or he may not have suffered damages due to Defendants' conduct, it does not necessarily follow that his interests are in conflict with or antagonistic to the unnamed class members. The Court, therefore, finds that Plaintiffs and Plaintiffs' counsel would adequately represent the interests of the absent class members if this Court were to certify the proposed class.

C. Can Plaintiffs' class be certified under Rule 23(b)?

If a proposed class satisfies the prerequisites of Rule 23(a) the Court still must find that a class action is the appropriate vehicle through which to resolve the litigation. *See* Advisory Committee notes to Rule 23. Rule 23(b) sets forth three situations in which a class action is appropriate. The relevant portions of Rule 23(b) read as follows:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . .
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or

> corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b). Plaintiffs seek class certification pursuant to subsection (b)(2) or, as an alternative (b)(3). The appropriate subsection under which to proceed is determined by the relief Plaintiffs seek.

1. Should the Court apply subsection (b)(2) or (b)(3) to Plaintiffs' Proposed Class?

Certification under subsection (b)(2) is only appropriate for classes seeking injunctive or declaratory relief. *See* Fed.R.Civ.P. 23(b).[4] According to the committee notes, this

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[4] Rule 23(b)(2) was promulgated in 1966 to facilitate enforcement of civil rights legislation. *See* 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.43[1][a] (3d ed.1997). Class actions under Rule

(Continued on following page)

"subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages." *See* Fed.R.Civ.P. 23(b) advisory committee's notes. The Supreme Court, in dicta, has called into question whether certification under Rule 23(b)(2) is ever appropriate when money is sought. *See Ticor Title Ins. Co. v. Brown,* 511 U.S. 117, 121, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994). The general rule at this point, however, is that monetary relief may be sought through a Rule (b)(2) class only if money [sic] damages are "merely incidental" to the requested injunctive relief. *See Smith v. Brown & Williamson Tobacco Corp.,* 174 F.R.D. 90, 100 (W.D.Mo.1997). Thus, whether the Court proceeds to analyze Plaintiffs' proposed class under Rule 23(b)(2) or Rule 23(b)(3) depends on whether the monetary relief sought by Plaintiffs is merely incidental to an overriding goal of injunctive relief.

According to their class complaint, Plaintiffs seek the following relief: (1) a declaratory judgment that Defendants' practices violate the Truth-in-Leasing regulations and an injunction preventing Defendants from violating the regulations in the future; (2) an accounting of all transactions and other activity related to the escrow funds; (3) the establishment of a common fund into which all unlawfully retained escrow funds and statutory interest will be deposited; (4) "disgorgement" of the escrow funds wrongfully held by Defendants; (6) [sic] an injunction preventing Defendants from transferring, diverting or otherwise concealing class members' escrow funds and

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23(b)(2), however, have been maintained outside the civil rights arena. *See id.* at § 23.43[1][c].

records pertaining thereto; and (7) reasonable attorneys' fees.

In determining whether money damages are incidental to injunctive relief and thereby the appropriate section under which to test certification, the Court need not remain blind to the "realities of the litigation." *In re School Asbestos Litigation,* 789 F.2d 996, 1008 (3d Cir.1986). The establishment of a fund into which retained escrow funds will be deposited, an injunction preventing the transfer of funds, and the ultimate disgorgement of the funds, all serve the ultimate goal of recovering money.

Furthermore, Plaintiffs characterize the monetary relief they seek as "disgorgement" of wrongfully held escrow funds. By their own estimate, the amount sought is equal to roughly $16 million. Although disgorgement is an equitable remedy, it does not qualify as injunctive relief. *See Pickett v. IBP, Inc.,* 182 F.R.D. 647, 656 (M.D.Ala.1998); *Sugai Products, Inc. v. Kona Kai Farms, Inc.,* No. 97-00043.SPK, 1997 WL 824022 at *10 (D.Haw.1997). Thus, even characterized as disgorgement, the relief sought by Plaintiffs is not relief contemplated by Rule 23(b)(2). *See Taylor v. Flagstar Bank,* 181 F.R.D. 509, 519 (M.D.Ala.1998); *Pickett,* 182 F.R.D. at 657. The $16 million sought by Plaintiffs is not merely incidental to the injunctive relief sought.

In addition to the foregoing, courts have the discretion to consider whether a Rule 23(b)(2) class is necessary or whether the same relief could be afforded in an individual action. *See* 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1785.2 (2001). In this case, it is clear that an injunction obtained by an individual class member would benefit the entire

class, thus making class certification under Rule 23(b)(2) inappropriate. *See id.* The Court, therefore, finds that the predominate relief sought in this case is money and thus, if any class is to be certified, it must be certified according to Rule 23(b)(3).

2. Is Plaintiffs' proposed class appropriate for certification under Rule 23(b)(3)?

Rule 23(b)(3) allows the Court to certify a class if the Court finds as follows:

> . . . . that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P. 23(b)(3).

a. Do common questions of law and fact predominate?

Rule 23(b)(3) first requires that the common questions which satisfied the prerequisite of Rule 23(a)(2) predominate over any individualized issues. *See* Fed.R.Civ.P. 23(b)(3). Rule 23(b)(3)'s requirement that questions common to the

class predominate over other questions is a more stringent test than the commonality requirement of Rule 23(a)(2). *See Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 609, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

Defendants argue that common questions do not predominate because the class members entered into different versions of the contracts at issue, Defendants have compulsory counterclaims against class members for breached contracts, and the determination of whether a class member suffered damage would require an individualized inquiry thus preventing certification. Thus, Defendants argue, this action would require the resolution of various individualized issues which predominate over common ones.

The only argument the Court will address is Defendants' damages argument because, as will be set forth, the individualized issues relating thereto prevent certification of this class.[5] Plaintiffs bring the pending action pursuant to 49 U.S.C. § 14704(a)(1) & (2). Those sections provide as follows:

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[5] The court would like to point out that much of Defendants' brief relates to what it contends are compulsory counterclaims. It is clear, however, that Rule 13 has no application in the class action context because unnamed class members are not considered "opposing parties" under that rule and thus, potential compulsory counterclaims can not serve as a barrier to class certification. *See Peterson v. United Accounts, Inc.,* 638 F.2d 1134, 1136 (8th Cir.1981); *Fielder,* 175 F.R.D. at 321 (same).

> (a) In general. –
>
> (1) Enforcement of order. . . . A person may bring a civil action for injunctive relief for violations of sections 14102 and 14103.
>
> (2) Damages for violations. – A carrier or broker . . . is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part.

49 U.S.C. § 14704(a).

As set forth above in the above discussion regarding the nature of Plaintiffs' requested relief, Plaintiffs characterize the relief they seek as disgorgement of roughly $16 million in wrongfully withheld escrow funds. Disgorgement is not injunctive relief, *see Pickett,* 182 F.R.D. at 656; *Sugai Products,* 1997 WL 824022 at *10. It is unclear whether a private party can seek an order of disgorgement under 49 U.S.C. § 14704. The Court, however, interprets Plaintiffs request for disgorgement to be a request for money damages pursuant to 49 U.S.C. § 14704(a)(2). This interpretation is supported by the pleadings in the case to date. *See* Plaintiffs' Suggestions in Response to Defendants' Motion for Judgment on the Pleadings, Doc. # 116; Plaintiffs' Suggestions in Response to Defendants' Motion for Summary Judgment, Doc. # 76.

Thus if Plaintiffs are entitled to any damages, the statute pursuant to which they seek recovery is 49 U.S.C. § 14704(a)(2). That section gives only persons who have sustained damages as a result of a violation an action to recover from a carrier. Therefore, Defendants are not liable for failing to return funds if those funds are offset by amounts owed to Defendants or if the owner-operator did

not terminate his or her lease with a positive balance in his or her escrow account.

If the Court were to certify this class, the Court would be required to make individualized determinations whether a class member suffered damage due to the lease terms about which Plaintiffs complain. The determination whether an owner-operator has a right to escrow funds would require an examination of individual drivers' accounts in an effort to determine whether, after termination of the lease, there remained a positive balance. Such an inquiry would necessarily entitle the Defendants to present individualized proof of offsets, advances and maintenance expenses charged to the owner-operators' accounts to determine whether any escrow funds remained to which the owner-operator may be entitled.

Court's are not bound to certify a class if the determination of whether class members suffered actual damage requires presentment of individualized proof. Treatment of such an issue in a class action "presumes the ability to prove fact of damage without becoming enmeshed in individual questions of actual damage . . . . Where proof of fact of damage requires evidence concerning individual class members, the common questions of fact become subordinate to the individual issues . . . . " *Martino v. McDonald's System, Inc.*, 86 F.R.D. 145, 146 (N.D.Ill.1980). The Court finds that determining whether an individual class member had suffered damage would require examination of individualized proof and predominates over common issues. As a result, the Court will deny Plaintiffs' motion for class certification.

Plaintiffs point out that a similar class action has been certified in the United States District Court for the

Southern District of Indiana. *See Owner-Operator Indep. Drivers Assoc. v. Mayflower Transit, Inc.*, 204 F.R.D. 138 (S.D.Ind.2001). In that case, the court certified a class of owner-operators seeking the return of "cash deposits" and/or fuel-tax moneys maintained in escrow accounts in excess of the 45 days following termination of a lease. *See id.* at 140. That court's order, however, was devoid of any discussion regarding the individual questions of actual damage. It is this consideration that leads this Court to respectfully disagree with the District Court for the Southern District of Indiana and hold that individualized issues prevent this case from being certified.

For the aforementioned reasons, the Court hereby DENIES Plaintiffs' Motion for Class Certification.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-3289/3482

Owner-Operator Independent Drivers, et al,	*	
Appellants/ Cross-Appellees,	*	Order Denying Petition
v.	*	for Rehearing and for
New Prime, Inc., et al,	*	Rehearing En Banc
Appellees/ Cross-Appellants.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

October 20, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Chapter 147
Enforcement; Investigations; Rights; Remedies

Sec. 14704. – Rights and remedies of persons injured by carriers or brokers

(a) In General. –

(1) Enforcement of order. –

A person injured because a carrier or broker providing transportation or service subject to jurisdiction under chapter 135 does not obey an order of the Secretary or the Board, as applicable, under this part, except an order for the payment of money, may bring a civil action to enforce that order under this subsection. A person may bring a civil action for injunctive relief for violations of sections 14102 and 14103.

(2) Damages for violations. –

A carrier or broker providing transportation or service subject to jurisdiction under chapter 135 is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part.

(b) Liability and Damages for Exceeding Tariff Rate. –

A carrier providing transportation or service subject to jurisdiction under chapter 135 is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff in effect under section 13702.

(c) Election. –

(1) Complaint to dot or board; civil action. –

A person may file a complaint with the Board or the Secretary, as applicable, under section 14701(b) or bring a civil action under subsection (b) to enforce liability against a carrier or broker providing transportation or service subject to jurisdiction under chapter 135.

(2) Order of dot or board. –

(A) In general. –

When the Board or Secretary, as applicable, makes an award under subsection (b) of this section, the Board or Secretary, as applicable, shall order the carrier to pay the amount awarded by a specific date. The Board or Secretary, as applicable, may order a carrier or broker providing transportation or service subject to jurisdiction under chapter 135 to pay damages only when the proceeding is on complaint.

(B) Enforcement by civil action. –

The person for whose benefit an order of the Board or Secretary requiring the payment of money is made may bring a civil action to enforce that order under this paragraph if the carrier or broker does not pay the amount awarded by the date payment was ordered to be made.

(d) Procedure. –

(1) In general. –

When a person begins a civil action under subsection (b) of this section to enforce an order of the Board or Secretary requiring the payment of damages by a carrier or broker providing transportation or service subject to jurisdiction under chapter 135 of this title, the text of the order of the Board or Secretary must be included in the complaint. In

addition to the district courts of the United States, a State court of general jurisdiction having jurisdiction of the parties has jurisdiction to enforce an order under this paragraph. The findings and order of the Board or Secretary are competent evidence of the facts stated in them. Trial in a civil action brought in a district court of the United States under this paragraph is in the judicial district in which the plaintiff resides or in which the principal operating office of the carrier or broker is located. In a civil action under this paragraph, the plaintiff is liable for only those costs that accrue on an appeal taken by the plaintiff.

(2) Parties. –

All parties in whose favor the award was made may be joined as plaintiffs in a civil action brought in a district court of the United States under this subsection and all the carriers that are parties to the order awarding damages may be joined as defendants. Trial in the action is in the judicial district in which any one of the plaintiffs could bring the action against any one of the defendants. Process may be served on a defendant at its principal operating office when that defendant is not in the district in which the action is brought. A judgment ordering recovery may be made in favor of any of those plaintiffs against the defendant found to be liable to that plaintiff.

(e) Attorney's Fees. –

The district court shall award a reasonable attorney's fee under this section. The district court shall tax and collect that fee as part of the costs of the action.

TITLE 49 – TRANSPORTATION

CHAPTER III – FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 376 – LEASE AND INTERCHANGE OF VEHICLES – Table of Contents

Subpart A – General Applicability and Definitions

Sec. 376.1 Applicability.

The regulations in this part apply to the following actions by motor carriers registered with the Secretary to transport property:

(a) The leasing of equipment with which to perform transportation regulated by the Secretary.

(b) The leasing of equipment to motor private carrier or shippers.

(c) The interchange of equipment between motor common carriers in the performance of transportation regulated by the Secretary.

Sec. 376.2 Definitions.

(a) Authorized carrier. A person or persons authorized to engage in the transportation of property as a motor carrier under the provisions of 49 U.S.C. 13901 and 13902.

(b) Equipment. A motor vehicle, straight truck, tractor, semitrailer, full trailer, any combination of these and any other type of equipment used by authorized carriers in the transportation of property for hire.

(c) Interchange. The receipt of equipment by one motor common carrier of property from another such

carrier, at a point which both carriers are authorized to serve, with which to continue a through movement.

(d) Owner. A person (1) to whom title to equipment has been issued, or (2) who, without title, has the right to exclusive use of equipment, or (3) who has lawful possession of equipment registered and licensed in any State in the name of that person.

(e) Lease. A contract or arrangement in which the owner grants the use of equipment, with or without driver, for a specified period to an authorized carrier for use in the regulated transportation of property, in exchange for compensation.

(f) Lessor. In a lease, the party granting the use of equipment, with or without driver, to another.

(g) Lessee. In a lease, the party acquiring the use of equipment with or without driver, from another.

(h) Sublease. A written contract in which the lessee grants the use of leased equipment, with or without driver, to another.

(i) Addendum. A supplement to an existing lease which is not effective until signed by the lessor and lessee.

* * *

(l) Escrow fund. Money deposited by the lessor with either a third party or the lessee to guarantee performance, to repay advances, to cover repair expenses, to handle claims, to handle license and State permit costs, and for any other purposes mutually agreed upon by the lessor and lessee.

* * *

Sec. 376.11 General leasing requirements.

Other than through the interchange of equipment as set forth in Sec. 376.31, and under the exemptions set forth in subpart C of these regulations, the authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions:

(a) Lease. There shall be a written lease granting the use of the equipment and meeting the requirements contained in Sec. 376.12.

* * *

Sec. 376.12 Written lease requirements.

Except as provided in the exemptions set forth in subpart C of this part, the written lease required under Sec. 376.11(a) shall contain the following provisions. The required lease provisions shall be adhered to and performed by the authorized carrier.

(a) Parties. The lease shall be made between the authorized carrier and the owner of the equipment. The lease shall be signed by these parties or by their authorized representatives.

* * *

(k) Escrow funds. If escrow funds are required, the lease shall specify: (1) The amount of any escrow fund or performance bond required to be paid by the lessor to the authorized carrier or to a third party.

(2) The specific items to which the escrow fund can be applied.

(3) That while the escrow fund is under the control of the authorized carrier, the authorized carrier shall

provide an accounting to the lessor of any transactions involving such fund. The carrier shall perform this accounting in one of the following ways:

(i) By clearly indicating in individual settlement sheets the amount and description of any deduction or addition made to the escrow fund; or

(ii) By providing a separate accounting to the lessor of any transactions involving the escrow fund. This separate accounting shall be done on a monthly basis.

(4) The right of the lessor to demand to have an accounting for transactions involving the escrow fund at any time.

(5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury.

(6) The conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease, and shall provide a final accounting to the lessor of all such final deductions made to the escrow fund. The lease shall further specify

that in no event shall the escrow fund be returned later than 45 days from the date of termination.

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